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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, INDIVIDUALLY and as CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

*Petitioners*,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

*Respondent*.

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**Petition for a Writ of Certiorari to the Supreme Court of Alaska**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, in imposing on non-resident commercial fishermen license and permit entry fees that are three times greater than those imposed on resident commercial fishermen, Alaska discriminates against interstate commerce in violation of the Commerce Clause?

2. Whether, in imposing on non-resident commercial fishermen license and permit entry fees that are three times greater than those imposed on resident commercial fishermen, Alaska violates the Privileges and Immunities Clause, particularly where the sole justification for the discrimination is that residents "contribute" oil royalty revenues to the State's fishery management efforts.

## PARTIES TO THE PROCEEDINGS

Other than the unnamed class members, all of whom are individual commercial fishermen who are not residents of Alaska, there are no petitioners or respondents in addition to those named in the caption.

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## PETITION FOR A WRIT OF CERTIORARI

Donald H. Carlson, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, individually and as class representatives on behalf of all persons similarly situated ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

## OPINIONS BELOW

The opinions of the Supreme Court of Alaska are reported at 798 P.2d 1269 (Alaska 1990) ("*Carlson I*"), reprinted at pages 33a-57a of the appendix to this petition, and at 919 P.2d 1337 (Alaska 1996) ("*Carlson II*"), reprinted at pages 1a-28a of the appendix to this petition. The final orders of the Superior Court of the State of Alaska are unreported. The Superior Court's "Decision and Final Order on Reconsideration of the Court's August 12, 1993 Order and Final Decision Granting the State's Motion for Summary Judgment" (July 25, 1994) may be found at pages 29a to 32a of the appendix to this petition. The Superior Court's "Final Order" (Feb. 21, 1989) may be found at page 58a of the appendix to this petition.

## JURISDICTION

The Supreme Court of Alaska entered its judgment on June 21, 1996. On September 10, 1996, on application of petitioners, Justice O'Connor extended the time in which to file the petition for writ of certiorari to and including October 21, 1996. On October 10, 1996, Justice O'Connor further extended the time in which to file the petition for writ of certiorari to and including October 31, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).[1]

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[1] The decision of the Alaska Supreme Court is final. Just as cases are final in which the amount of damages remains to be determined, so here the judgment is final even though an issue remains whether a partial refund should be granted. Further proceedings on that issue will not moot either the Commerce Clause or the Privileges and Immunities Clause issues. *See Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 478-80 (1975).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are located in the appendix to this petition at App. 59a-63a.

## STATEMENT

This case presents questions as to whether, consistent with the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution, Alaska may discriminate against non-resident commercial fishermen by charging them three times the licensing and permitting fees it charges resident commercial fishermen for access to the State's fisheries. Alaska concedes that the higher fees imposed on non-residents are not based on any higher costs involved in fishing by non-residents.

Petitioners urge that Alaska's license and permit fee differential violates both the Commerce Clause and the Privileges and Immunities Clause. The constitutional issues presented by this case are of particular significance in light of the large number of states that, like Alaska, discriminate against non-resident commercial fishermen in imposing license and permit fees, and the increasing importance of the commercial fishing industry to the nation at large.

### 1. The Alaskan Fishing Industry

Fishing is a major industry in Alaska. After oil, the fishing industry "is the second largest contributor to the State's economy, generating over $77 million in taxes and fees to the State in 1994."[2] The fishing industry also is a significant employer, employing over 35,000 workers and operating more than 550 processing facilities within the State.[3]

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[2] Commercial Fisheries Entry Commission, 1994 Annual Rpt. at 1 ("Annual Report").

[3] *Id.*

Alaska's fishing industry figures prominently in the country and the world. In 1995, commercial fishermen at Alaskan ports landed 5.4 billion pounds of fish, valued at $1.4 billion.[4] That same year, total commercial landings at all United States ports were 9.9 billion pounds of fish with a value of $3.8 billion.[5] Thus, in 1995, commercial landings at Alaskan ports represented more than half of the total national catch of fish (in pounds) and approximately 40% of the value of fish caught and landed at U.S. ports. This is not surprising, given that Alaska has "five of the Nation's top ten fishing ports" in terms of commercial landings.[6] The State's commercial landings — quantities of fish bought and sold — are so large that, "[i]f Alaska were a nation, it would rank among the top ten worldwide seafood producers . . . ahead of nations such as Norway, Canada, and Iceland."[7]

Given the sheer size of the fish pool in Alaskan waters, it is not surprising that large numbers of non-residents annually go to Alaska to participate in its many commercial fisheries. In 1992, the last year for which data appear in the record, Alaska issued 32,327 permits, of which 25,837 were issued to residents; thus, 20 per cent of all permits were held by non-residents.[8] From 1984 to 1992, Alaska issued approximately 30,000 permits per

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[4] National Oceanic and Atmospheric Administration, *Fisheries of the United States*, at vi (1995) ("*Fisheries*"). The next highest state in terms of commercial landings in 1995 was Louisiana with 1.1 billion pounds. *Id.*

[5] *Id.* at iv.

[6] Annual Report at 1.

[7] *Id.*

[8] *See Carlson v. State of Alaska*, Case No. 3AN-84-5790, "State's Supplemental Memorandum In Support Of Its Motion For Summary Judgment On Remand: Additional Budgetary Items Relevant To The Privileges And Immunities Clause And Commerce Clause Challenges," at 20 (Alaska Superior Ct., Nov. 1, 1993).

year; for that six year period, approximately 16 per cent of permits were issued to non-residents.[9]

In recognition of the important interstate character of the fishing industry, federal statutes and regulations operative in the Alaska waters effectuate a comprehensive federal regulatory scheme. As the Magnuson Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1882) ("Magnuson Act") declared, "[c]ommercial . . . fishing constitutes a major source of employment and contributes significantly to the economy of the Nation." Pub. L. No. 94-265, § 2(a)(3), 90 Stat. 332. The Magnuson Act and its enabling regulations establish a far-reaching program of fisheries management and conservation. This is particularly true with respect to Alaskan waters. Indeed, one reason for the enactment of the Magnuson Act was to develop fisheries for Alaska's bottom fish, because it "is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby." *Id.* at § 2(a)(7), 90 Stat. 332.[10]

Despite the federal regulations, Alaska retains the power to tax fishing in its territorial waters and to impose licensing and permitting fees. *See Alaska v. Arctic Maid*, 366 U.S. 199, 203 (1961); *Toomer v. Witsell*, 334 U.S. 385, 393 (1948); Alaska Stat. §§ 16.43.100(a)(18), 16.43.160.[11]

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[9] *Id.*

[10] The national interest also is reflected in international treaties that govern the amount of catch and ownership of fish fishing in Alaska. For example, the U.S. Canadian Pacific Salmon Treaty (1985) assigns ownership of fish to the country in which they spawn. *See Treaty Concerning Pacific Salmon*, Jan. 28, 1985, U.S. - Canada, TIAS 11091.

[11] Alaska controls the waters within three miles of its shore; the federal government has authority over the three to two-hundred mile range. *See* 43 U.S.C. § 1301.

**2. The Alaskan License and Permit Tax Schemes**

All persons seeking to fish in Alaska for commercial purposes are required to purchase a commercial fishing license. App. 59a. The State charges residents $30 for this license. *Id.* Non-residents, in contrast, must pay $90 for the identical license. *Id.* In addition, fishermen seeking to fish in certain Alaska waters — the most intensively used commercial fisheries — are required to purchase limited entry permits.[12] App. 60a-63a. Like the licenses, the cost of limited entry permits depends on whether the fisherman is a resident or a non-resident. For non-residents, the annual renewal fee for these limited entry permits is three times higher than the fee residents must pay. App. 59a-61a. Translated into dollars, residents annually pay between $50 and $250 for the limited entry permits.[13] For non-residents, the annual fee for the identical limited entry permit ranges from $150.00 to $750.00. App. 61a. Non-residents therefore may be required to pay as much as $500 more than residents for precisely the same permit. Alaska has essentially admitted that the overall purpose of the permit system is to keep non-residents out of Alaska's fisheries: "Absent limited entry, many of the State's high-valued fisheries would experience large increases in effort by new entrants from several states. Such increases in effort would raise management costs and would likely threaten the resource and the livelihood of many Alaskans in coastal communities where commercial fishing is the cornerstone of the economy."[14]

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[12] The limited entry program is designed to maintain the "stability" of Alaska's fisheries resources by "regulating and controlling entry" into its commercial fisheries. *See* Title 16, Article 43, Alaska Statutes. Respondent Commercial Fisheries Entry Commission ("CFEC") is the regulatory body created to manage that program. Alaska Stat. § 16.43.020.

[13] The cost of permits varies with the profitability of particular fisheries. *See* App. 59a-60a.

[14] Annual Report at 3.

The effect of the higher costs imposed on non-residents can be significant. For example, a resident fisherman, fishing in the Bristol Bay herring spawn on kelp fishery, would have an annual permit cost of $50. App. 3a n.4. In contrast, a non-resident seeking to fish in that same fishery would have an annual permit cost of $150. App. 3a n.4. From 1983 to 1993, the average gross earnings per permit for the Bristol Bay herring spawn on kelp fishery ranged from $847 to $1613. App. 3a n.4. The permit fee for a single non-resident herring fisherman thus represented, for the Bristol Bay herring spawn on kelp fishery from 1983 to 1993, approximately 10% to 20% of gross earnings.

Alaska's policy of discriminating against non-residents for commercial fishing license purposes dates back to its days as a Territory. In 1951, the Ninth Circuit held unconstitutional, under the Commerce Clause, an Alaskan territorial statute imposing a $50 commercial license fee on non-residents where residents were required to pay a fee of only five dollars. *Anderson v. Mullaney*, 191 F.2d 123, 125 (9th Cir. 1951), *aff'd*, 342 U.S. 415, 417-18 (1952). The Ninth Circuit recognized that "the necessary effect of the discrimination was to discourage, hamper and burden this interstate movement of fishermen." 191 F.2d at 128. The Ninth Circuit declined to reach the Privileges and Immunities Clause issue because of its holding of unconstitutionality under the Commerce Clause. This Court held that territories, as well as states, are subject to constitutional limitations, and also held that Alaska's discriminatory fishing license fees violated the Privileges and Immunities Clause. *Mullaney v. Anderson*, 342 U.S. 415, 416, 419-20 (1952).

Thereafter, at the time of statehood, and despite this Court's decision in *Mullaney v. Anderson*, the Alaska legislature enacted a fishing gear licensing requirement under which non-residents were again charged discriminatory fees — three times the fees paid by residents for the same gear types. App. 34a. Although the contours of the commercial fishing licensing system were changed again in 1973 and in 1977, with gear licenses eventually eliminated and limited entry permits created, Alaska continued to discriminate against non-residents by imposing higher fees for

licenses and permits. App. 35a-36a. The present case is apparently the first challenge to these discriminatory fees since *Mullaney v. Anderson*.

### 3. The Proceedings Below

Petitioners are a class of non-resident commercial fisherman who have been required to pay three times as much as Alaska residents to obtain necessary fishing licenses and permits. App. 1a-2a, 33a. Petitioner Carlson is a non-resident salmon gillnetter in the Peninsula-Aleutians drift gillnet fishery. Petitioner Hart is a non-resident salmon gillnetter in the Bristol Bay drift gillnet fishery. Petitioner Haskins is a non-resident fisher who has held commercial licenses for salmon in the Kodiak purse seine fishery, the Prince William Sound purse seine fishery, the statewide herring purse seine fisheries and the statewide herring spawn fisheries. Petitioner Libby is a non-resident Bristol Bay salmon drift gillnetter. Both petitioner Earl Weese and petitioner Lyla Weese are non-resident salmon setnetters in the Bristol Bay salmon setnet fishery. *See*, *Carlson v. State of Alaska*, Case No. S-6590 Appellants' Excerpt of Record at 2-3 (Alaska Supreme Ct., filed Jan. 3, 1995) (hereafter Excerpt of Record).

Petitioners filed suit in Alaska Superior Court, challenging discriminatory Alaska statutes and regulations, specifically, Alaska Stat. §§ 16.05.480 and 16.43.160(b), and Alaska Admin. Code tit. 20, § 05.240. App. 33a. Petitioners' complaint requested a declaration that, *inter alia*, the differential fees violated the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. App. 33a-34a. Petitioners sought to permanently enjoin the state from exacting these higher license and permit fees from non-residents, and they requested a refund of the fees paid by non-residents that exceeded those paid by residents.

***Carlson I.*** The case first came before the Alaska Superior Court on the merits on Commerce Clause and Privileges and Immunities Clause questions in February 1987. Alaska conceded that no benefits are conferred through its licenses and permits on non-resident commercial fishermen that resident commercial

fishermen do not also enjoy. Excerpt of Record at 58. In addition, Alaska conceded that non-resident commercial fishermen do not impose greater costs on the state than resident commercial fishermen. *Id.* Alaska also conceded that non-resident commercial fishermen do not create any regulatory problems "capable of solution only by the discriminatory taxes at issue here." *Id.* But Alaska urged that the discrimination was justified, in order to ensure that non-residents contributed to the general costs of government devoted to fisheries management. App. 37a.

On crossmotions for summary judgment, the Superior Court held that commercial fishing is within the reach of the Commerce Clause, and that, on its face, the fee differential "discriminated against interstate commerce." App. 40a. Nonetheless, the court concluded that the "legitimate local purpose of ensuring that non-residents pay their fair share of fisheries management costs justified the discrimination, assuming the fee differential bore a substantial relationship to that purpose." *Id.* (internal quotations omitted).

In addition, relying on this Court's decision in *Toomer v. Witsell*, 334 U.S. 385 (1948), the Superior Court held that commercial fishing falls within the Privileges and Immunities Clause. App. 40a. Nonetheless, the court concluded that the State had demonstrated a "permissible" reason for the discrimination — "to have the non-resident[s] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of the state, which costs are largely borne by the residents through general fund expenditures." *Id.*

On appeal, the Alaska Supreme Court stated that the analysis under the Commerce Clause, "assuming it is implicated," is similar to the analysis under the Privileges and Immunities Clause. App. 47a. The court noted, however, that early cases from this Court had "suggested that the Commerce Clause does not come to play until the fish are actually harvested . . . ," although "[d]ictum in more recent cases suggests the contrary." *Id.* at n.4. It appears that the Alaska Supreme Court did not

reach a conclusion about the Commerce Clause challenge at that time.

As to the Privileges and Immunities Clause, the Alaska Supreme Court agreed with the Superior Court that "[c]ommercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against non-residents are prima facie a violation of it." App. 43a. However, the Alaska Supreme Court remanded the case for consideration of "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." App. 50a. To the court, Alaska's unique revenues from petroleum production are the functional equivalent of taxes "which only residents pay." *Id.* Put another way, "where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference." App. 50a-51a. On remand, the Superior Court was to determine "whether the higher fees charged nonresidents are excessive for this purpose." App. 51a.

***Carlson II.*** On remand, the parties each proposed a different method by which to compare the fees paid by non-residents with the expenditures of state revenues to which non-residents make no contribution. App. 4a. Petitioners proposed a formula under which the contribution made by each resident to the cost of maintaining the commercial fisheries is compared with the fee differential. *Id.* The Superior Court rejected that formula, instead adopting Alaska's approach, which "in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by non-residents." App. 4a-5a. Applying that analysis, the court concluded that the discriminatory fees did not violate the Privileges and Immunities Clause because "residents paid by way of taxes or the economic equivalent of taxes, *i.e.*, benefits foregone, substantially more than non-resident

fishers pay toward the benefits received. . . ." App. 31a; *see* App. 5a.

On appeal, the Alaska Supreme Court rejected the claim that higher fees imposed on non-residents violate the Commerce Clause. According to the court, it is only when harvested fish cross state lines that they become articles of commerce. Because, the court stated, "the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits," App. 7a-8a, the decisions of the United States Supreme Court "do[ ] not require that the fee differential challenged herein be evaluated under the Commerce Clause." App. 7a.

As to the Privileges and Immunities Clause, the Alaska Supreme Court essentially held that the compensatory tax rules applicable under the Commerce Clause did not apply. App. 10a-12a. The court held that the Alaska fee differential "merely balances out any conservation expenditures from taxes which only residents pay." App. 11a (citing *Toomer*, 334 U.S. at 399). The Alaska Supreme Court refused to apply this Court's decision in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 114 S.Ct. 1345 (1994), in which this Court held that the Commerce Clause does not permit states to consider residents' contributions to general tax revenues as compensating for higher fees imposed on out-of-state competitors. App. 10a-11a. Although the Alaska court acknowledged that "the reasoning of Privileges and Immunities Clause cases has been used in Commerce Clause cases," App. 10a, it did not consider it appropriate to apply the Commerce Clause reasoning of *Oregon Waste Systems* to the Privileges and Immunities Clause issue, stating that "[t]hese are different inquiries for which the analysis is not interchangeable." *Id.* The Alaska Supreme Court remanded the case to the Superior Court for application of the proper formula under the Privileges and Immunities Clause. Under the formula approved by the court, a complete refund of the fee differential is impossible. The lower court, however, is

to determine whether a partial refund of fees paid by non-residents should be awarded. App. 14a-16a.[15]

Justice Rabinowitz dissented. App. 22a-28a. First, he would have applied this Court's decision in *Oregon Waste Systems* and the compensatory tax doctrine to the Privileges and Immunities analysis. App. 22a. While acknowledging this Court's dicta in *Toomer v. Witsell* that a state could "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay," he noted that this Court recently has "explicitly rejected this type of justification for state discrimination in the Commerce Clause context" in *Oregon Waste Systems*. App. 25a. Justice Rabinowitz stated that he "cannot . . . join in the majority's summary rejection of the United State's Supreme Court decision in *Oregon Waste Systems*." App. 24a. Indeed, to the dissent, "the mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause," and the Supreme Court's use of "Commerce Clause precedent in deciding claims based solely on the Privileges and Immunities Clause," App. 22a (citing *Hicklin v. Orbeck*, 437 U.S. 518, 531-532 (1978)), made it appropriate to apply the compensatory tax doctrine to the Privileges and Immunities Clause. According to Justice Rabinowitz, while the two clauses are not completely interchangeable, "once it has been determined that a discriminatory policy falls within the purview of one or both of these clauses . . . , I am not persuaded that the methodology of the two should diverge in any significant respect." App. 22a-23a.

Second, applying *Oregon Waste Systems*, Justice Rabinowitz would have held the discriminatory fee structure unconstitutional. He found "the justification offered by Oregon for discriminating against out-of-state interests in *Oregon Waste Systems* . . . very similar, if not identical, to the justification advanced by the State

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[15] While the State may argue that certain procedural requirements for a refund have not been met, there is no issue concerning the propriety of declaratory and injunctive relief.

in the case at bar." App. 24a. In each case, the respective states were making a "fair share" argument and in each case the state's share or contribution was augmented by general state tax revenues in Oregon, or their analytical equivalent (oil royalty revenues) in Alaska, "in order to justify the tax or fee discrepancies." App. 25a.

The Petition for Writ of Certiorari followed.

## REASONS FOR GRANTING THE WRIT

This case presents important and far-reaching questions concerning the application of the Commerce Clause and the Privileges and Immunities Clause to commercial fishing operations.

Alaska requires non-resident commercial fishermen to purchase licenses and permits at a cost three times greater than those purchased by residents. Despite this facial discrimination against non-resident commercial interests, the Alaska court held that the Commerce Clause is not even implicated, much less violated. As to the Privileges & Immunities Clause, the court below held that the Clause was applicable but that the fees paid by non-residents were valid to the extent that they compensated for "contribution[s] made by residents" to general revenue, App. 11a, a theory this Court routinely rejects in looking at discriminatory taxes under the Commerce Clause.

The decision below, which constitutes an unmistakable effort to protect local industry from out-of-state competition, has nationwide significance. At least nineteen states similarly discriminate against non-resident commercial fishermen. *See infra* at 25 n.20. If not reversed, the decision below will encourage other states both to disregard this Court's well-established Commerce Clause jurisprudence and to continue to apply antiquated rules under the Privileges and Immunities Clause, which this Court's decisions have long since discredited.

## I. THE DECISION BELOW CONFLICTS WITH COMMERCE CLAUSE DECISIONS OF THIS COURT

The decision of the Alaska Supreme Court clearly holds that this Court's decisions "do[ ] not require that the fee differential challenged herein be evaluated under the Commerce Clause." App. 7a. While the decision below is not a model of clarity, the reasons for the court's conclusion appear to be twofold. First, according to the Alaska court, discrimination "based on the residency status of those applying for permits" is not evaluated under the Commerce Clause. App. 8a. Second, the "fee differentials . . . are not predicated upon the movement of articles of commerce across state lines," as the fish are caught prior to entering the stream of interstate commerce. App. 7a-8a. Each holding directly conflicts with longstanding decisions of this Court.

### A. The Decision Below Conflicts With This Court's Decisions Holding That The Commerce Clause Precludes States From Discriminating Based on Residency

In holding that discrimination based on residency is not cognizable under the Commerce Clause, the Alaska Supreme Court, relying on plainly inapplicable decisions of this Court, declared that this Court has instead "consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses." App. 8a.[16] This holding reflects a serious and fundamental

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[16] In support of its claim, the Alaska court cited five decisions of this Court. App. 8a, n.10. None even suggests that discrimination against commercial interests based on residency is not cognizable under the Commerce Clause. The Commerce Clause holding of *Toomer v. Witsell*, which has been wholly discredited, *see infra* at 17-19, did not relate to the higher license fees imposed on nonresidents, but rather to a nondiscriminatory tax imposed on the taking of shrimp. In *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984), the municipal resident hiring preference at issue there was not subject to a Commerce Clause challenge because

misconception of this Court's Commerce Clause jurisprudence and conflicts with decisions of this Court going back more than 100 years. The decision below is not supported by any decisions of this Court.

Nearly 170 years ago, this Court rejected the notion that the Commerce Clause does not reach discrimination based on residency: "The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce." *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 448 (1827). Since that time, this Court consistently has rejected that theory. Thus, in *Walling v. Michigan*, 116 U.S. 446 (1884), this Court held that a tax imposed on out-of-state residents selling liquor in the state, which was not imposed on in-state residents, violated the Commerce Clause. To the Court, the Commerce Clause prohibits a state from imposing a tax "in a matter of commerce between the States . . . so specialized as to operate as a discriminative burden . . . against the citizens of another State." *Id.* at 460.

More recently, in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), this Court relied on the Commerce Clause to strike down a North Carolina statute that, while neutral on its face, imposed costs on non-resident apple sellers that were not imposed on resident apple sellers. Similarly, in *Armco v. Hardesty*, 467 U.S. 638 (1984), this Court struck

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Camden, in limiting employment to residents, was operating as a market participant, and thus was shielded from Commerce Clause scrutiny. In *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), as the Court was careful to point out, the parties had not raised any Commerce Clause challenge to the Alaska law giving a preference to state residents. *Sosna v. Iowa*, 419 U.S. 393 (1975), concerned residency limitations on a state court's divorce jurisdiction; there were no commercial interests advanced to implicate the Commerce Clause. Finally, the Alaska Court's reliance on *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978), is wholly misplaced. That case involved recreational, not commercial, hunting, and no Commerce Clause challenge was brought.

down, as a violation of the Commerce Clause, a West Virginia statute subjecting out-of-state manufacturers to a gross receipts tax from which in-state manufacturers were exempt. In *New Energy Co. v. Limbach*, 486 U.S. 269 (1980), this Court invalidated a reciprocal tax credit because it, "in effect, tax[es] a product made by [Indiana] manufacturers at a rate higher than the same product made by Ohio manufacturers." *Id.* at 276.

This rule applies with equal force where the discrimination concerns natural resources. The Commerce Clause is implicated whenever a state seeks "to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce." *Hicklin v. Orbeck*, 437 U.S. 518, 533 (1978). It is by now well established that the Commerce Clause forbids a state from "accord[ing] its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (citing *West v. Kansas Natural Gas Company*, 221 U.S. 229 (1911)).

Thus, in *Philadelphia v. New Jersey*, this Court held that New Jersey violated the Commerce Clause when it banned the importation of most waste in order to preserve landfill space — a natural resource. 437 U.S. at 628-29. Likewise, in *Pennsylvania v. West Virginia*, 262 U.S. 553, 600 (1923), this Court held that West Virginia's efforts to preserve natural gas produced in the state for its own citizens violated the Commerce Clause. West Virginia had tried to preserve natural gas for its citizens by prohibiting distributors from exporting natural gas out of the state where producers would be unable to adequately serve users in the state. *Id.* at 593. More recently, in *Oregon Waste Systems*, this Court relied on its earlier holding in *Philadelphia v. New Jersey* to make clear that states cannot prefer their own citizens in granting "a right of access" to natural resources within the state. *Oregon Waste Systems*, 114 S.Ct. at 1354. As a result, this Court held that Oregon's imposition of a surcharge on the in-state disposal of waste generated out-of-state violated the Commerce Clause. *Id.* at 1354-55.

The decision below also directly conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Anderson v. Mullaney*, affirmed by this Court. There, the Ninth Circuit held that Alaska territorial statutes, which imposed a $50 fee on non-resident commercial fishermen while imposing only a $5 fee on resident commercial fishermen, violated the Commerce Clause. 191 F.2d at 125. In affirming the Ninth Circuit's decision, *see supra* at 6, this Court did not disapprove the Ninth Circuit's Commerce Clause holding.

In each of these cases, out-of-state interests were subjected to burdens that were not imposed on their in-state competitors. In each of these cases, those costs were found to violate the Commerce Clause. It does not matter, as the decision below seems to suggest (*see* App. 7a-8a), whether the out-of-state commercial interest is a corporation, *see, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), or an out-of-state individual, *see, e.g., Freeman v. Hewit*, 329 U.S. 249, 255 (1946). In each instance the question to be determined is whether the state statute discriminates against interstate commerce. Thus, as this Court held in the use tax context, "[t]he conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated" is required. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 70.

### B. The Decision Below Conflicts With Decisions of This Court Holding That The Protections of The Commerce Clause Apply Even Before Articles Enter The Stream of Commerce

The decision below also conflicts with this Court's holdings that the Commerce Clause forbids discrimination against interstate commerce even before the articles have entered the stream of commerce. Despite Alaska's facial discrimination against non-resident commercial fishermen, the Alaska Supreme Court apparently concluded, in both *Carlson I* and *Carlson II*, that the protections of the Commerce Clause did not apply because "the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines . . . ." App.

7a-8a. In reaching this conclusion the court below relied on *Toomer v. Witsell*'s holding that the taking of shrimp in South Carolina could be taxed because the "taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." 334 U.S. 385, 394-95 (1948). The court's reliance on *Toomer v. Witsell* in the present context is misplaced; in any event, that aspect of *Toomer v. Witsell* has long been discredited.

The Commerce Clause holding of *Toomer v. Witsell* was directed solely to the question of whether the state could impose a nondiscriminatory tax on the taking of shrimp, despite the fact that the shrimp industry was interstate in character. At the time *Toomer v. Witsell* was decided, this Court still sometimes held that "direct" taxes on interstate commerce were invalid, but that the states could tax certain local activities that occurred before interstate commerce commenced. *See, e.g., Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87-88 (1948); *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 166 (1954). This distinction allowed states to circumvent the prohibition on state taxation of the "privilege" of engaging in interstate commerce. *See, e.g., Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 502 (1947) (tax on vehicles engaged in interstate commerce constitutional where tax applies "exclusively to operations wholly within the State . . . although those operations are interstate in character").

The last vestiges of the rule that the states could not tax the "privilege" of engaging in interstate commerce were removed in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and the line drawn between taxation on local activities taking place before interstate commerce commences and taxation on interstate commerce no longer has any validity. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981) ("a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce").

Like *Toomer* itself, the case on which it relied, *Heisler v. Thomas Colliery Co.*, 260 U.S 245 (1922), *see* 334 U.S. at 395 n.22, also has been discredited. This Court has expressly disapproved "*Heisler* and its progeny" for the notion that the Commerce Clause only applies once the article of commerce has "[entered] the flow of interstate commerce." *Commonwealth Edison Co.*, 453 U.S. at 617.[17]

Thus, this Court has unequivocally rejected the formalistic and anachronistic distinction between "local activities," to which the Commerce Clause would not apply, and goods that have "ent[ered] the stream of commerce," to which the Commerce Clause would apply. *Commonwealth Edison Co.*, 453 U.S. at 617; *see, e.g., C&A Carbone Inc. v. Town of Clarkstown*, 114 S.Ct. 1677, 1681 (1994) (although garbage is processed before it entered the stream of interstate commerce, the economic effects are "interstate in reach"); *Washington State Apple Advertising*

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[17] Even at the time *Toomer* was decided, this Court did not sanction discriminatory taxation of "local" activities. In *Toomer* itself the "local" activity holding did not extend to the discriminatory license fee (which was invalidated under the Privileges and Immunities Clause), but only to a tax imposed directly on the shrimp caught. In fact, three Justices concurred separately in *Toomer* to emphasize their view that the discriminatory license fee was invalid under the Commerce Clause. Justices Frankfurter and Jackson, although recognizing a state's power over resources destined solely for in-state markets stated that "[i]t is a wholly different thing for the State to provide that only its citizens shall be engaged in commerce among the States, even though based on a locally available food supply. . . . When a State regulates the sending of products across State lines we have commerce among the States as to which State intervention is subordinate to the Commerce Clause." 334 U.S. at 409 (Frankfurter, J., concurring). Justice Rutledge, in a separate concurrence, stated with respect to a state regulation aimed directly at interstate commerce, "it was exactly that sort of state regulation the commerce clause was designed to strike down." 334 U.S. at 410. As discussed earlier, *see supra* at 17-19, this Court has since *Toomer* repeatedly made clear that discriminatory taxes on local activities are invalid under the Commerce Clause.

*Comm'n*, 432 U.S. at 350; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970); *Nippert v. Richmond*, 327 U.S. 416, 423-24 (1946). Plainly, states cannot discriminate against interstate commerce based on the claim that the discrimination applies only to activities "local" in character. Any other rule would eviscerate the Commerce Clause because "[a]ll interstate commerce takes place within the confines of the states and necessarily involves 'inci-dents' occurring within each state through which it passes. . . ." *Id.* at 421. The discriminatory tax scheme at issue here plainly violates the commerce clause, and the decision below warrants review by this court.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT CONTRIBUTIONS MADE BY RESIDENTS TO GENERAL TAX REVENUES CANNOT JUSTIFY DISCRIMINATORY TAXES

This case also presents important questions under the Privileges and Immunities Clause. This Court long ago recognized that "the object of the [Privileges and Immunities Clause is] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). Consistent with that principle, this Court has held that the Privileges and Immunities Clause protects the right to engage in a common trade or profession within other states.

In fact, over 100 years ago, this Court held that imposing a higher license fee on non-resident traders than those imposed on resident traders violates the guarantee of the Privileges and Immunities Clause against "being subjected to any higher tax or excise than that exacted by law of . . . permanent residents." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871). In what this Court has referred to as "the first, and long the leading, explication of the Clause," Justice Washington, sitting as Circuit Justice, held that "the fundamental privileges and immunities protected by the Clause" include "'an exemption from higher taxes or impositions than are paid by the other citizens of the

state.'" *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230)).

This Court has made clear that commercial fishing is a protected profession. In *Toomer v. Witsell*, this Court held that the higher shrimp license fee imposed on non-residents violated the Privileges and Immunities Clause. As the Court there declared, "it was long ago decided that one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396. Thereafter, in *Mullaney v. Anderson*, this Court declared that, pursuant to its decision in *Toomer v. Witsell*, the Privileges and Immunities Clause "would bar any state from imposing" a license fee that discriminated based on residency. 342 U.S. at 417-18. Thus, there can be no question but that nonresident commercial fishermen in Alaska are protected by the Privileges and Immunities Clause, and the decision of the Alaska Supreme Court directly conflicts with this Court's decision in *Mullaney v. Anderson*.

Under the Privileges and Immunities Clause, as under the Commerce Clause, different treatment of non-residents is justified only in extraordinary circumstances.[18] Under the Commerce Clause, discrimination may be justified if there is a legitimate state interest that cannot be achieved by alternative nondiscriminatory means. For example, in *Maine v. Taylor*, 477 U.S. 131 (1986), this Court rejected a Commerce Clause challenge to Maine's ban on the importation of live bait. The ban was held to serve the "legitimate local purpose" of protecting native fisheries from parasitic infection and there was, at that time, no "sampling and inspection procedures" in existence for baitfish which would obviate the need for the total ban. *Id.* at 147-48. Similarly,

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[18] Given the common origin of the two clauses, this is hardly surprising. *See Baldwin*, 436 U.S. at 379 ("In the Articles of Confederation, where both Clauses have their source, the two concepts were together in the fourth Article").

under the Privileges and Immunities Clause, discrimination can be justified if the nonresident is "somehow . . . shown to 'constitute a peculiar source of evil at which the statute is aimed.'" *United Bldg. & Constr. Trades v. Mayor & Council of Camden*, 465 U.S. 208, 222 (1984) (quoting *Toomer*, 334 U.S. at 398).

No such claim is made in this case, nor could it be, as the State of Alaska has expressly conceded that non-resident commercial fishermen do *not* create "regulatory problems capable of solution only by the discriminatory taxes at issue here." Excerpt of Record at 58. Instead, the Alaska court held that the discrimination is justified because "residents pay proportionately more in foregone benefits than nonresidents for fisheries management." App. 10a. The court below looked to benefits derived from oil royalty revenues paid the State by oil companies and "foregone" by state residents.

To be sure, some earlier Privileges and Immunities Clause cases suggested that such a compensatory tax justification might be acceptable. In *Toomer v. Witsell*, for example, this Court noted in dicta that "[t]he State is not without power . . . to charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." 334 U.S. at 398-99. But no decision of this Court has ever upheld such discrimination, much less a discrimination based on a theory of foregone revenues, and a comparable justification has been discredited under the Commerce Clause.

Before the late 1970s, in Commerce Clause cases this Court sometimes appeared to agree that "rough justice" may have been all that was required under the Commerce Clause. One example of that approach was reflected in *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941). At issue there was an annual fee imposed by Virginia on each vehicle used to distribute goods where the seller did not have an office in the Commonwealth. Exempted from this requirement were manufacturers taxable on capital stock or distributors of manufactured goods paying a license tax on purchases. *Id.* at 118. In upholding the tax, this Court noted that

the challenged tax "is but one portion of a comprehensive scheme of taxation" under which manufacturers, wholesale merchants, retail merchants and peddlers at retail are all subject to other taxes. *Id.* at 120.

That approach has now been explicitly rejected by this Court in the Commerce Clause context. In *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court struck down under the Commerce Clause a West Virginia gross receipts tax on wholesalers from which local manufacturers were exempt. The Court rejected the argument that the wholesale tax exemption did not discriminate against out-of-state taxpayers because it served as compensation for the imposition of a heavy manufacturing tax on in-state taxpayers. The Court held that "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." 467 U.S. at 643 (citation omitted). This Court specifically discredited *Caskey Baking*, finding that it involved "a nondiscriminatory tax on a particular kind of business," and another tax on a different kind of business. *Id.* at 643 n.7.

More recently, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, this Court noted its "recent reluctance to recognize new categories of compensatory taxes," and expressly rejected the notion that discrimination against interstate commerce can be justified by reference to the "share of the costs" born by intrastate commerce "through general taxation" 114 S.Ct at 1352-53. "[P]ermitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation 'would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds.'" *Id.* at 1353 n.8 (quoting *Government Suppliers Consol. Serv., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992)). Just last Term this Court reaffirmed this prohibition, referring to "the danger of treating general revenue measures as relevant intrastate burdens for purposes of the compensatory tax doctrine." *Fulton Corp. v.*

*Faulkner*, 116 S.Ct. 848, 851 (1996). As a result, this Court "declined . . . to open such an expansive loophole in our carefully confined compensatory tax jurisprudence." *Id.* (internal quotation omitted)[19]

Just as this Court refused to permit the general burdens of taxation as "compensation" for discriminatory taxes under the Commerce Clause, so too the Court should reject the notion under the Privileges and Immunities Clause. As Justice Cardozo long ago explained, the purpose under the Commerce Clause of a truly compensatory tax scheme is to ensure that "the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). That purpose is equally applicable under the Privileges and Immunities Clause.

## III. THIS CASES PRESENTS AN IMPORTANT AND RECURRING ISSUE MERITING THIS COURT'S REVIEW

The decision below is one in a long line of cases in which states have tried to provide economic protection for their in-state industries by burdening out-of-state competitors. In response,

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[19] This Court has been "unwilling to plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events . . . .'" *Fulton Corp. v. Faulkner*, 116 U.S. 848, 859 (1996) (quoting *Oregon Waste Systems, Inc. v. Department of Envt'l Quality*, 114 S.Ct 1345, 1353 (1994)); *see American Trucking Ass'ns., Inc. v. Scheiner*, 483 U.S. 266, 289 (1987). This Court has recognized that "'courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.'" *Fulton Corp.*, 116 S.Ct at 859 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 589-90 & nn.12-14 (1983)).

"[t]he Court consistently has found parochial legislation of this kind to be constitutionally invalid. . . ." *Philadelphia v. New Jersey*, 437 U.S. at 626. Just last Term, this Court reaffirmed that the Commerce Clause prohibits states from imposing "regulatory measures designed to benefit in-state interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 116 S.Ct. at 853 (quotation omitted). This case is unusual only in that the state has explicitly admitted that this was the purpose of the permit scheme. *See supra* at 5.

This rule applies whether the local industry being protected is milk or liquor or waste or apples or manufacturing or natural resources. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (Hawaii tax exempting locally-produced liquor, but not liquor produced out-of-state violated Commerce Clause); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (law prohibiting sale of milk unless processed within five miles of center of town held to violate Commerce Clause because it benefitted local milk producers at the expense of out-of-state milk producers); *West Lynn Creamery, Inc. v. Healy*, 114 S.Ct. 2205 (1994) (tax on milk sold to Massachusetts retailers used to subsidize in-state producers held to violate Commerce Clause); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992)(Alabama's imposition of higher fee on disposal of hazardous waste from other states than on the identical waste from Alabama held to violate Commerce Clause); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S.Ct. 1345 (Oregon's surcharge on out-of-state waste held to violate Commerce Clause); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (North Carolina statute that imposed costs on non-resident apple sellers that were not imposed on resident apple sellers held to violate Commerce Clause); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (Arizona statute that required all Arizona-grown cantaloupes to be packaged within the State prior to export held to violate the Commerce Clause); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (Alaska regulation that required all Alaska timber taken from state lands to be processed within the State prior to export held to violate the Commerce Clause).

This Court also has held unconstitutional a Louisiana statute forbidding out-of-state transportation of shrimp taken in Louisiana waters, until the heads and shells had been removed. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *see also Johnson v. Haydel*, 278 U.S. 16 (1928) (state restrictions on catching and canning of oysters destined for shipment and sale in interstate commerce violated Commerce Clause); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (Oklahoma statute which forbade transportation of natural minnows out of the state for purposes of sale, held to violate the Commerce Clause).

Under the Alaska license and permit scheme, Alaska residents are given a substantial preference, in the form of lower license and permit fees, over non-residents for purposes of fishing. Alaska does not stand alone in preferring its residents to non-residents where commercial use of natural resources is concerned. In fact, at least nineteen other states discriminate against non-residents in the imposition of commercial fishing license and permit fees.[20] This sort of resource protectionism requires this

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[20] *See, e.g.*, Ala. Code § 9-12-80 (Alabama charges non-residents nearly two times as much as residents, unless the non-resident's state has entered into a reciprocity agreement with Alabama); Cal. Fish & Game Code § 7852 (California charges non-residents almost twice as much as residents); Del. Code Ann. tit. 7 § 914 (Delaware charges non-residents ten times as much as residents); Fla. Stat. Ann. § 370.06(2) (Florida charges non-residents four times as much as residents); Ga. Code Ann. § 27-2-23 (Georgia charges non-residents nearly ten times as much as residents); Idaho Code § 36-802 (Idaho charges non-residents twice as much as residents); 515 Ill. Comp. Stat. 5/20-45, 5/20-55 (Illinois charges non-residents four times as much as residents) Iowa Code Ann. § 483A.1 (Iowa charges non-residents about twice as much as residents); La. Rev. Stat. Ann. § 56:303 (Louisiana charges non-residents almost eight times as much as residents); Me. Rev. Stat. Ann. tit. 12, § 6505 (Maine charges non-residents ten times as much as residents); Mich. Comp. Laws Ann. § 324.43532 (Michigan charges non-residents twice as much as residents); Miss. Code Ann. § 49-15-29 (Mississippi charges non-residents three times as much as residents); N.J. Stat. Ann. § 23:5-24.2 (New Jersey charges non-residents ten times as much as residents

Court's attention, particularly in light of the growing importance of the commercial fishing industry in interstate commerce.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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pay, unless the non-resident's state would charge a New Jersey resident the same amount as a resident of that state for a similar license); N.C. Gen. Stat. § 113-152 (North Carolina charges non-residents $200.00 or an amount equal to the non-resident fee charged by a non-resident's state); Okla. Stat. Ann. tit. 29, § 4-103 (Oklahoma charges non-residents more than twice as much as residents); Or. Rev. Stat. § 508.285 (Oregon charges non-residents twice as much as residents); S.C. Code Ann. § 50-17-250 (South Carolina does not impose any discriminatory fees upon a non-resident unless that non-resident's state charges South Carolina residents a fee); Tenn. Code Ann. § 70-2-205 (Tennessee charges non-residents four times as much as residents); Tex. Parks & Wild. Code §§ 47.002, 47.007, 31 Tex. Admin. Code § 53.6 (Texas charges non-residents more than seven times as much as residents); Wash. Rev. Code Ann. § 75.28.110(1)) (Washington charges non-residents slightly less than twice what residents pay).